

## When Inter-Branch Norms Break Down: Of Arms-for-Hostages, Orderly Shutdowns, Presidential Impeachments, and Judicial Coups

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# WHEN INTER-BRANCH NORMS BREAK DOWN: OF ARMS-FOR-HOSTAGES, “ORDERLY SHUTDOWNS,” PRESIDENTIAL IMPEACHMENTS, AND JUDICIAL “COUPS”

*Peter M. Shane*<sup>†</sup>

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## INTRODUCTION

Future historians of American government surely will take note of a remarkable series of domestic political events around the turn of the Twenty-First Century. Congress impeached a President for lying about a

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sexual liaison.<sup>1</sup> The Supreme Court rendered judgment in a case that effectively decided a presidential election.<sup>2</sup> A President of the United States asserted inherent constitutional power to deploy U.S. military forces “[t]o forestall or prevent . . . hostile acts by our adversaries”<sup>3</sup> even if “uncertainty remains as to the time and place of [an] enemy’s attack;”<sup>4</sup> to provide for the potentially indefinite peacetime detention of U.S. citizens in military custody;<sup>5</sup> and—in a less celebrated, but wholly unprecedented move—to authorize the private trustees of former Presidents to claim executive privilege with regard to historical records of the presidency.<sup>6</sup>

Right or wrong, all of this is certainly *different*. Some of these episodes have no historical antecedents; others have precedents, but only in vastly different historical contexts. Moreover, each of these moves, directly or indirectly, bodes potentially significant consequences for all branches of the national government, not just the branch taking the initiative in question. Congress’s impeachment of President Clinton weakened the executive branch, at least temporarily. The Supreme Court implicated itself to an unprecedented degree in the political fortunes of the federal executive, and deprived Congress of what presumably would have been its authority to judge the validity of electoral votes in the 2000 election.<sup>7</sup> The presidential positions I have mentioned would derogate seriously from Congress’s role in regulating the use of military force; limit the role of the judiciary in enforcing civil liberties, and prevent members of Congress (and the public more generally) from obtaining key information about the historic operation of the executive branch. These are but the most dramatic examples of a long series of institutional behaviors among our three branches of government that seem to break from what would appear, from at least World War II onward, to be the customary ways of doing business.<sup>8</sup>

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<sup>1</sup> Three of the more important accounts, told from different perspectives are JOE CONASON & GENE LYONS, *THE HUNTING OF THE PRESIDENT: THE 10-YEAR CAMPAIGN TO DESTROY BILL AND HILLARY CLINTON* (2000); RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999); and JEFFREY TOOBIN, *A VAST CONSPIRACY* (1999).

<sup>2</sup> See *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>3</sup> National Security Strategy of the United States, <http://www.whitehouse.gov/nsc/nss5.html> (Sept. 2002).

<sup>4</sup> *Id.*

<sup>5</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

<sup>6</sup> Exec. Order No. 13,233, 66 Fed. Reg. 56,025, 56,028 (Nov. 1, 2001).

<sup>7</sup> See 3 U.S.C. § 15 (2002).

<sup>8</sup> In his response to this article, Professor Saikrishna Prakash makes the point that norm change, in and of itself, ought not be troubling; we should be troubled only if less sound norms replace more sound norms. Saikrishna Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J. L. AND PUB. POL. 543, 544 (2003). I do not disagree. It is not norm change per se that I am critiquing. I

The reason this matters is complex. We have a national system of government whose orderly and effective operation depends to an exceptional degree upon certain norms of cooperation among its competing branches. The strength of those norms is essential to securing the primary political asset that our government design was intended to help realize: an especially robust form of democratic legitimacy. If recent norm-bending initiatives constitute a trend, rather than a series of coincidental, but unlinked episodes, then the capacity of our government to manifest this particular form of legitimacy may be endangered. Such a development should not proceed unnoticed.

Part I briefly reviews the constitutional theory of checks and balances in its American form, pinpointing the system's implicit dependence on norms of inter-branch cooperation within the national government. Part II recounts four recent episodes that illustrate the increasing fragility of those norms that had characterized modern inter-branch cooperation until the mid-1980s. Part III analyzes the causes of current inter-branch tensions, and Part IV suggests how matters might be improved. Improvement is important because, in terms of inter-branch norms, we may otherwise be headed towards a new equilibrium that does considerable violence to America's modern practice of democratic legitimacy.

## I. CHECKS AND BALANCES, DEMOCRATIC LEGITIMACY, AND INTER-BRANCH COOPERATION

At the heart at our founders' design for a new republican form of government is a web of political institutions structured to hold each other to account through what is called "checks and balances." As James Madison explained, it is not enough for the security of liberty that the constitutional text provide for three separate and distinct branches of the national government.<sup>9</sup> Nor is it sufficient that legislative, executive, and judicial powers should each, in the main, be concentrated chiefly in just one of those branches. Power, he wrote, "is of an encroaching nature"<sup>10</sup>

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am critiquing the substitution of norms that support inter-branch consensus building and democratic deliberation with norms that favor winner-take-all-politics and unproductive inter-branch tension. Professor Prakash also notes that norms change all the time, and implicitly suggests that it is arbitrary for me to refer to World War II as a baseline. I mention World War II only because I am supposing that norms of governance reflect larger social norms, and, therefore, it is not especially instructive to compare the norms of modern American society with the norms of, for example, slaveholding American society. Having said that, Professor Prakash is correct to the extent that I might have chosen the enactment of the Voting Rights Act of 1965 or the end of the Vietnam War as the most recent social upheavals of sufficient significance to be regarded as epoch-marking. For purposes of the present paper, however, I do not think it matters.

<sup>9</sup> THE FEDERALIST NO. 48, at 308-09 (James Madison) (Clinton Rossiter ed., 1961).

<sup>10</sup> *Id.*

and must "be effectually restrained from passing the limits assigned to it."<sup>11</sup> The separation of powers, in other words, is essential to liberty, but cannot, without sound institutional design, preserve itself.

In the Framers' hands, the key institutional imperative was to structure the national government so that each branch, acting under the influence of foreseeable ambitions and incentives, would keep both itself and its coordinate branches within their respective constitutionally-assigned roles. In Madison's famous words, protection against tyranny "must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>12</sup> In operation, this required some complex calculations. The Framers had to position the branches of the new government to achieve a careful balance of autonomy and interdependence. If each branch was to be able to keep the others in check, then each branch had to be vested with some effective powers of review that the other branches could not easily impede. Most obvious among the Framers' choices in this regard are the presidential veto and pardon powers, Congress's power to impeach and remove, and the courts' power to review both executive and legislative acts. In general, the manner in which each branch deploys these checking powers is entirely within its discretion.

At the same time, in order that the branches not use their autonomous powers with undue disregard for the prerogatives of their coordinate branches, each branch had to be put in a position of partial institutional dependency. For the most part, each branch needs the forbearance, if not actually the agreement of, the other two branches in order to work its will. Thus, Congress cannot easily legislate without presidential agreement, and cannot execute the laws once passed. The President is dependent for most of his initiatives on key officials whom the Senate must confirm, and on appropriations that Congress must enact. The judiciary does not execute its own judgments, and depends on Congress for both appropriations and the delimitation of its jurisdiction. Through this combination of what might be called "autonomous powers" and "collaborative powers," the branches were thus given both positive incentives to cooperate and weapons to retaliate against uncooperative conduct.

In addition to the prophylactic virtue of constraining power, this system promised also an affirmative virtue—fostering deliberation. The multiplicity of institutions, each with different constituencies, organizational structures, modes of selection, and internal decision-making processes, would insure that the nation would embark on no program of

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<sup>11</sup> *Id.*

<sup>12</sup> THE FEDERALIST No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

public policy without the examination of that policy from a wide array of perspectives. This was critical to the Framers not only on the general ground that, all things being equal, it is better to make important decisions through careful consideration, rather than rashly and without discussion. It was also critical to insure that, in the process of deciding upon national affairs, all affected interests would have a genuine opportunity to be heard and to have their interests accounted for in a collective determination of the public interest. In Hamilton's words:

The oftener [a] measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, *or of those missteps which proceed from the contagion of some common passion or interest.*<sup>13</sup>

Deliberation among numerous parties embodying a diversity of interests was thus essential to decisionmaking consistent with justice. In contrast, decisionmaking based on "some common impulse of passion, or of interest,"<sup>14</sup> would be tainted by what Madison called the spirit of "faction."<sup>15</sup> The web of new governmental structures was designed, in sum, to help insure that policy outcomes represented something other than "an unjust combination of the majority of the whole."<sup>16</sup>

The Framers called their theory of legitimate government "republicanism," but, in modern parlance, we recognize their republicanism as an extraordinary advance in both the theory and practice of what we call democratic legitimacy. Governments rule legitimately when the relative few who exercise the power of the state are morally entitled to rule.<sup>17</sup> It is the implicit claim of democratic systems that democratic governments are morally entitled to govern because, to the maximum extent possible, democracy insures that the interests of all citizens are entitled to and will receive full and fair consideration in the making of public policy.<sup>18</sup> The genius of the American constitution lies in the realization of its framers that such full and fair consideration of all citizens' interests requires a multiplicity of legitimating mechanisms.<sup>19</sup> That is, the Framers might

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<sup>13</sup> THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

<sup>14</sup> THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>15</sup> *Id.*

<sup>16</sup> THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) (emphasis supplied).

<sup>17</sup> See generally Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689 (2002).

<sup>18</sup> See *id.* at 704. See also ROBERT A. DAHL, ON DEMOCRACY 62-80 (1998).

<sup>19</sup> See generally Peter M. Shane, *Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy*, 60 OHIO ST. L. J. 693 (1999).

have provided for a system that relied for legitimacy entirely on the electoral accountability of government officials. Plainly, they did not. Alternatively, they might have provided for a system that relied entirely on wise and public-minded deliberation, without recourse to popular sentiment. They did not do that either. Instead, they combined elements of what we would now call both representative democracy and deliberative democracy into a unique set of “republican” institutions. These checking and balancing components combine elements of both representative and deliberative legitimacy, while preventing one another from overstepping their constitutionally assigned bounds.

Of course, neither fair deliberation, nor even the more general hobbling of government’s tyrannical impulses, was the Framers’ sole objective. First and foremost, they wanted a government that would work and would effectively advance the “permanent and aggregate interests of the community”<sup>20</sup> in both domestic and international affairs. From that standpoint, any government of separated powers poses obvious difficulties. Such a government revolves around no one source of authority that so embodies the sovereign power of the state—or, in the American example, of the people—that it can act quickly in the public interest. The Framers thus designed a form of institutional interdependence that orients the system towards consensus, but at a price. Their system inevitably entails delay in decisionmaking and a bias in favor of gradualism.

Norms of institutional cooperation are therefore essential to enable a government of separated powers to achieve its multiple potential virtues. It is not merely foreseeable, but intended, that the three coordinate branches of government experience tension and competition. Friction, to some extent, is a sign of the system at work. But life cannot be all friction. As British Prime Minister Lord John Russell famously put the point: “Every political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed.”<sup>21</sup> A system of separated powers, in other words, works only if every branch is committed to effective governance and is willing to forbear from the deployment of its powers to their extreme theoretical limits. In a separation of powers system designed to embody checks and balances, where powers are allocated to each branch precisely with the purpose of rendering each branch vulnerable to the discretion of the others, forbearance is imperative.

Ordinarily, at least four factors in the American system coincide to produce the “forbearance” that averts any serious breakdown of government. One is the internalization within each institution of norms of def-

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<sup>20</sup> THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>21</sup> Letter of Lord John Russell to Poulett Thomson (October 14, 1839), available at [http://www.constitution.org/sech/sech\\_133.txt](http://www.constitution.org/sech/sech_133.txt) (last visited Apr. 14, 2003).

erence for the core capacities of the other two branches. The history of Article III jurisdiction provides a powerful case in point. The past two centuries are replete with examples of the federal judiciary rendering decisions antagonistic to the views and interests of the elected branches of government. It seems impossible to explain the forbearance of the elected branches from substantially curtailing federal jurisdiction in classes of controversial cases unless we regard that forbearance as a sign of our elected officials' allegiance to the near inviolability of the judicial function.<sup>22</sup>

A second factor is a common belief in the legitimacy and necessity of active government. Frequently, even amid deep policy disagreement between the executive and legislative branches, public policy compromises emerge in the solution of public problems because both elected branches are committed to demonstrating their capacity to respond in some constructive way to public challenges. Federal campaign finance reform legislation resulted, in part, from this joint impulse.<sup>23</sup>

Third, each branch—but each of the elected branches especially—has historically been motivated to represent a broad range of public opinion on critical issues. Thus, again, even when the elected branches disagree significantly on public policy, each is typically motivated to seek the approval of a wide spectrum of American voters.

Finally, each branch of the government is structured internally so as to promote deliberation, thus increasing the likelihood that multiple points of view will be heard and given time to help shape long-term policy outcomes. Congress, for example, is divided into two Houses, which must concur in a legislative proposal in order that it be enacted. The length of term and geographical basis of representation is different in the two Houses, which, originally, were also selected by different methods.<sup>24</sup> The judiciary consists of a Supreme Court and lower courts through which legal interpretation evolves in a highly formal, multi-voiced way. The fact that Article III judges have lifetime tenure also insures that, at any given moment, the judiciary is populated by judges whose pre-judicial careers exhibited a variety of ideological and political predispositions. Even the constitutional text describing the executive branch,

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<sup>22</sup> GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 81 (14th ed. 2001).

<sup>23</sup> See Karen Foerstel, *Campaign Finance Passage Ends a Political Odyssey*, 60 CONG. Q. WKLY. REP. 799 (Mar. 23, 2002) (discussing the Bipartisan Campaign Reform Act of 2002, Pub.L. No. 107-155, 116 Stat. 81).

<sup>24</sup> As originally drafted, the Constitution provided that the House of Representatives should be elected by those voters in the states qualified to vote for the larger houses of their respective state legislatures, U.S. CONST. art. I, § 2, cl. 2, but that the Senators from each state should be chosen by the respective state legislatures. U.S. CONST. art. I, § 3, cl. 1, *repealed by* U.S. CONST. amend. XVII.



the most unitary of the three branches, contemplates that the President may seek advice from the heads of departments.<sup>25</sup> Deliberation was an intended feature of the new government through and through.

Unfortunately, significant evidence has mounted over the last twenty years that all these restraining factors are eroding. Each of the branches has been deploying its powers with increasing disrespect for its co-equal branches. One can see this trend, for example, in the increasing aggressiveness of the United States Supreme Court in reviewing the constitutionality of federal statutes. Of the 151 federal statutes declared unconstitutional in whole or in part by the Court between 1789 and June 2000, 40—over 26 per cent—were declared unconstitutional since 1981.<sup>26</sup> This number might be misleading, of course, because it is difficult to come up with a baseline figure of the total volume of federal legislation enacted since 1981. However, a significant number of the recent cases of invalidation result from wholly new doctrine or standards of review.<sup>27</sup> It is hard to escape the impression that the Court is not approaching its review functions modestly, but instead actually is inventing new reasons for invalidating legislation.

Even more threatening to government's capacity to function, however, has been the escalating institutional conflict between the President and Congress. A variety of episodes between the 1980s and the present demonstrate a level of mutual disregard between the elected branches that would have been essentially unthinkable at any prior moment in modern times.

It is important to be clear on what is new about this. It is not unprecedented for one branch of government to chafe against restraints imposed by others or even to undertake initiatives pressing the edges of its constitutional prerogatives. The overall system has some capacity to self-correct for such tensions. If, however, one looks at the historic points of greatest tension among the branches—Andrew Jackson's battle against the National Bank, the impeachment of Andrew Johnson, or the attempted court-packing of President Franklin Roosevelt—they have generally been characterized by an impulse that is absent from the current trend. In opposing the Bank, Jackson was standing fast against an

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<sup>25</sup> See U.S. CONST. art. II, § 2, cl. 1.

<sup>26</sup> U.S. SENATE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 2001-31 (1st Sess. 1992); U.S. SENATE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, 2000 SUPPLEMENT, S. DOC. NO. 106-27, at 151-158 (2d Sess. 2000).

<sup>27</sup> See, e.g., Ruth Colker and James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000).

institution widely regarded as supporting the interests of creditors against the interests of the less monied classes. Andrew Johnson was impeached for opposing Reconstruction, which was intended to end white caste rule in the South. Roosevelt proposed court-packing in response to what he regarded as the Court's unwillingness to legitimate legislative and executive measures designed to relieve the Depression and for which the elected branches enjoyed a popular mandate. Thus, each of these earlier assaults on conventional ways of doing business was arguably in the attempted service of more democracy. The desire to broaden representation is consistent with the political motivations behind institutional norms that favor checks and balances, which have frequently been impulses towards the inclusion of more voices, not fewer, in democratic decisionmaking. Thus, even though checks and balances were compromised by such earlier inter-branch battles, the challenges to business as usual tended to be supportive of the very aspirations for democratic legitimacy that checks and balances are supposed to advance.

The impulses behind recent breaches of inter-branch accommodation, however, are decidedly antidemocratic. Their aim has been to insulate government decisionmaking from popular accountability and to place government authority yet more firmly in the hands of those who represent fewer interests, not more. Thus, recent breaches have done more than threaten the normal operation of checks and balances in the short term; they have sought to defeat the very purposes for which checks and balances were constitutionalized. This is exceedingly dangerous, and it is not coincidental. The "thought leaders" of the revolt against what might be considered the post-World War II conventional wisdom regarding inter-branch interaction are also jurisprudentially antagonistic to a view of the Constitution that revolves around checks and balances.<sup>28</sup> Our recent political history demonstrates just what such a view puts at risk.

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<sup>28</sup> The Federalist Society for Law and Public Policy has been the intellectual home for the key figures in the academy, government, and legal practice, who have both elaborated in principle and implemented in practice the modern constitutional theory of presidentialism. Key figures include the current National Chairman and co-founder, Professor Steven G. Calabresi, and co-founder Lee Liberman, both of whom worked in the Bush I White House, and current Board of Visitors members Edwin Meese III, former counselor to President Reagan and Attorney General during the second Reagan Administration, and C. Boyden Gray, White House counsel under President George H.W. Bush. Current Solicitor General Theodore B. Olson, who was assistant attorney general in charge of the U. S. Justice Department Office of Legal Counsel during the first Reagan Administration, is also a former member of that Board. Examples of Professor Calabresi's seminal scholarship in this area include Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23 (1995) [hereinafter *Unitary Executive*]; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 *YALE L.J.* 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153 (1992). To be sure, there are legal academics decidedly not of the Federalist Society's

What counts as significant norms of inter-branch behavior is, of course, a matter of debate. Norms are nowhere written down, and discerning the significance of events that arguably reinforce or undermine norms is at least as uncertain a venture as, for example, discerning the significance of constitutional text. My point will be made, however, if we focus on just three general normative propositions that seem to follow more or less ineluctably from the most rudimentary assumptions of American constitutional theory.

The first norm derives the Framers' unambiguous intention, embodied fully in the constitutional text, to create and authorize three different branches of the national government. We do not need any specific theory of what each branch would do or how precisely the branches would interrelate to draw the confident inference that each branch was intended to serve some core function that would not be identical to the core functions of the other two branches. Otherwise, having three branches would be nonsensical. From this, it follows, as a constitutional norm, that no branch should use its autonomous powers to usurp the core powers of a coordinate branch or to undermine a coordinate branch's capacity to exercise its core powers at all. Such inter-branch aggression would threaten the Constitution's most self-evident structural premise.

The second norm follows from the Madisonian design by which powers were allocated to the three branches. As explained above, that design was to assure that the respective branches would keep "each other in their proper places" by their "mutual relations," which would depend upon a combination of autonomy and interdependence.<sup>29</sup> If interdependence is as critical to the Framers' system as autonomy, then it follows that no branch should seek to eliminate longstanding forms of interdependency between the branches. This norm may sound all but identical to the first, but it really is not. Although one way by which a branch might be tempted to eliminate its interdependency with another branch would be to usurp the other branch's powers, it is possible to attack the powers of another branch without attacking interdependency. For example, if Congress were to try categorically to outlaw all executive privilege claims in judicial proceedings—a move I would think unconstitutional, at least as applied to many such claims—it would be disabling the executive, but not eliminating its own dependency on the executive. Thus, the norm against the usurpation of power and the norm against undermining interdependency, however reinforcing, are logically distinct.

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political persuasion who support some aspects of presidentialism. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). Their analyses, however, stop short of Professor Calabresi's categorical views on the scope of the President's unreviewable discretionary powers.

<sup>29</sup> THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)

The third norm is arguably less self-evident, but is as compelled by the Framers' theory of representation as the other two norms were compelled by their structural design. That theory held that the proper representation of contending interests depended upon making every government decisionmaker accountable to a sufficiently wide range of parties that no official would be tempted to elevate the parochial interests of the few consistently over the public interest of the many.<sup>30</sup>

In short, one does not need to dig too deeply into constitutional theory to identify three important norms that strengthen the capacity of a checks and balances government to manifest robust democratic legitimacy through responsiveness to the widest range of salient interests, while still permitting significant political and institutional competition. They are:

C<sub>1</sub>: No branch of government should use its autonomous powers to usurp the core powers of a coordinate branch or to undermine a coordinate branch's capacity to exercise its core powers at all.

C<sub>2</sub>: No branch of government should seek to eliminate longstanding forms of interdependency between the branches.<sup>31</sup>

P<sub>1</sub>: Elected officials ought to govern with the aim of responding to the agenda of a public broader than even their own most fervent electoral supporters.

With regard to the two constitutional norms, C<sub>1</sub> and C<sub>2</sub>, it is hard to believe that any federal office holder would deny their existence or importance. The third norm is a staple of what counts for conventional wisdom in political science. All specify forms of behavior that are desirable from a separation-of-powers standpoint in that they directly support the democratic purposes of checks and balances in government. To lay the groundwork for my analysis of how these norms are faring, I will focus first on four recent episodes that reveal behavior by the elected branches of government determinedly at odds with these rudimentary propositions and the form of democratic legitimacy they are intended to further.

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<sup>30</sup> THE FEDERALIST NO. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961).

<sup>31</sup> See discussion *supra* p. 512.

## II. ATTACKING CHECKS AND BALANCES: FOUR EPISODES

### A. ELIMINATING CONGRESS'S FOREIGN POLICY ROLE: THE IRAN-CONTRA SCANDAL

In general terms, Congress's status as a co-equal branch is centrally dependent on three sets of authorities: its control over "the purse," its powers of substantive legislation, and its authority to investigate. Congress would hardly be a serious counterweight to its coordinate branches without these powers. Any attempt by another branch to circumvent this triumvirate of powers entirely in an area of shared, constitutionally vested authority would obviously breach an implicit norm of inter-branch comity.

Despite the President's pivotal role on the international stage, Congress's combined arsenal of fiscal, legislative, and investigative powers is no less important in foreign than in domestic affairs. Congress has the express power to regulate foreign commerce.<sup>32</sup> It regulates immigration and defines offenses under international law.<sup>33</sup> The ratification of treaties and the appointment of ambassadors require the Senate's assent.<sup>34</sup> Congress has the power to provide for the support of our military and to declare war.<sup>35</sup> And, of course, there may be foreign policy ramifications, both direct and indirect, to Congress's exercise of legislative powers in the domestic arena, as well as in its exercise of its fiscal authorities.

Between 1984 and 1986, the Reagan Administration committed a significant assault on all of these powers—legislative, fiscal, and investigative—in an attempt to oust Congress from foreign policymaking influence with regard to Nicaragua. Congress, in line with clear public sentiment, had proscribed the use of military or intelligence appropriations to aid military forces (the "Contras") seeking to overthrow the government of Nicaragua.<sup>36</sup> In a stunning three-pronged attack on Congress's authority in this area, the executive sought to raise money for the Contras independently of Congress (in evasion of Congress's fiscal powers), facilitate that fundraising through arms sales that flouted applicable federal law (in evasion of Congress's legislative powers), and to lie about it, even under oath (in evasion of Congress's investigative powers).

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<sup>32</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>33</sup> U.S. CONST. art. I, § 8, cls. 4, 10.

<sup>34</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>35</sup> U.S. CONST. art. I, § 8, cls. 11-16.

<sup>36</sup> REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H. REP. NO. 100-433, at 395-99, 404-05 (1st Sess. 1987) [hereinafter *Iran-Contra Report*]. On the lack of public support for Contra funding, see PUBLIC OPINION IN U.S. FOREIGN POLICY: THE CONTROVERSY OVER CONTRA AID 64-65 (Richard Sobel ed., 1993); Richard Sobel, *Public Opinion About United States Intervention in El Salvador and Nicaragua*, 53 PUB. OP. Q. 114, 124 (1989).

In November, 1986, while denying that the deals represented a trade of "arms for hostages"—American hostages held by radical Islamic groups in Lebanon with ties to Iran—President Reagan confirmed reports that the United States over the previous two years had facilitated six sales of anti-tank missiles, anti-aircraft missiles, and spare parts for missile systems to Iran<sup>37</sup>—sales that were unlawful under various statutes regulating the international sale of arms.<sup>38</sup> National Security Council (NSC) staff facilitated the diversion of profits from the arms sales to the support of the Contras. In brief, Oliver North helped set up a nominally private company through which to funnel proceeds from the arms sales to the Contras<sup>39</sup>—funds that belonged to the United States and could lawfully be spent pursuant only to an appropriation or other legal authority.<sup>40</sup> No such authority had been enacted. When the web of operations became public, North and a host of other officials, including National Security Adviser John Poindexter and former National Security Adviser Robert McFarlane, lied to Congress, destroyed evidence, and unlawfully withheld information from investigators.<sup>41</sup> Seven officials were convicted of these crimes, although the convictions of North and Poindexter were set aside on the ground that the cases against them were tainted by evidence that they had supplied voluntarily to Congress under a grant of immunity.<sup>42</sup> A prolonged independent counsel investigation came to an end in 1993, after President George H. W. Bush, following his loss in the 1992 elections, pardoned six high officials who had either been convicted of Iran-Contra offenses or were under continuing investigation.<sup>43</sup>

All of this might be dismissed as an isolated scandal without lasting political implications except that executive branch Republicans have been all but unrepentant about it. President Reagan's vice-president and successor, George H. W. Bush, adopted a remorseless view of the events, signaling a clear lack of understanding as to their constitutional significance. Specifically, he embraced the view of former NSC official Oliver North that attempts to bring legal accountability to those involved in the scandal were merely attempting to "criminalize policy differences."<sup>44</sup> For its part, the George W. Bush Administration has appointed two of the officials who admitted to misleading Congress in this affair to significant

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<sup>37</sup> THE TOWER COMMISSION REPORT: THE FULL TEXT OF THE PRESIDENT'S SPECIAL REVIEW BOARD 502-03 (N.Y. Times ed., 1987).

<sup>38</sup> See Iran-Contra Report, *supra* note 30, at 414-16, 418-19.

<sup>39</sup> See *id.* at 413.

<sup>40</sup> See *id.* at 411-14.

<sup>41</sup> See Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 398-99 nn. 156-66 (1993).

<sup>42</sup> *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).

<sup>43</sup> See Shane, *supra* note 41, at 401-02.

<sup>44</sup> See *id.* at 401, n. 179.

policy positions.<sup>45</sup> It is clear that those currently in power do not regard Iran-Contra as having been a serious constitutional threat.

#### B. SHUTTING DOWN THE EXECUTIVE ESTABLISHMENT: THE 1995 BUDGET SHOWDOWN

Among Congress's powers, the Framers may have considered the "power of the purse" most important. It encompasses the authority both to raise revenues and to determine the purposes for which public revenues would be spent. Lest there be any doubt about Congress's pivotal role on this score, the Constitution not only explicitly confers on Congress the authority to tax and to spend,<sup>46</sup> but it separately forbids the executive branch to extract funds from the treasury except as pursuant to properly enacted appropriations.<sup>47</sup> Moreover, so that the relationship of this function to the legitimacy of government would not be obscured, the Framers insisted that revenue bills begin in the House of Representatives, giving ultimate control of the public fisc to what was then the sole institution of government directly accountable to the people.<sup>48</sup> Madison's analysis underscores the importance of these decisions:

The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse — that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as

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<sup>45</sup> President George W. Bush appointed Elliott Abrams, who pleaded guilty to withholding information from Congress, to be senior director of the National Security Council's Office for Democracy, Human Rights and International Operations. He likewise appointed John Poindexter to lead the Information Assurance Office at the Department of Defense's Defense Advanced Research Projects Agency (DARPA). It is perhaps noteworthy that, in this capacity, Admiral Poindexter was in charge of what was originally called the Total Information Awareness program, whose aim is to "imagine, develop, apply, integrate, demonstrate, and transition information technologies, components, and prototype closed-loop information systems that will counter asymmetric threats by achieving total information awareness that is useful for preemption, national security warning, and national security decision making." See Roy Mark, *Senate Kills Funding for Pentagon Data Mining*, internetnews.com, at <http://www.internetnews.com/bus-news/article.php/1574021> (Jan. 24, 2003). Quite wonderfully, given Admiral Poindexter's record, DARPA's capacities include technologies for "[s]tory telling, change detection, and truth maintenance." DARPA Information Awareness Office website, <http://www.darpa.mil/iao/> (last visited on Aug. 28, 2003).

<sup>46</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>47</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>48</sup> U.S. CONST. art. I, § 7, cl. 1.

the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.<sup>49</sup>

Of necessity, however, the very premise of three co-equal branches implies a normative limitation on the plenary scope of the appropriations power. That is, it is presumably imperative that Congress not to use its fiscal authority—however free of express textual limits in the Constitution—simply to eliminate or shut down a coordinate branch.

Notwithstanding that indispensable norm, Republicans in control of Congress in 1995 threatened to withhold funding from the executive branch entirely unless President Clinton relented on a series of budget priorities that had been the core of his successful 1992 campaign for the Presidency.<sup>50</sup> On every issue drawn between them in this debate—funding for education, environmental protection, Medicare and Medicaid—public opinion favored the President's position.<sup>51</sup> Nonetheless, congressional Republicans did not relent until the nation sustained two across-the-board shutdowns of government agencies, in November and December, 1995, of seven and twenty-one days, respectively.<sup>52</sup> Congress and the President finally agreed in April 1996 on appropriations for Fiscal Year 1996, which had begun on October 1, 1995.<sup>53</sup> Even with the shutdowns, Congress ultimately enacted a record fourteen so-called "continuing resolutions" to keep the government running in the interim.<sup>54</sup>

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<sup>49</sup> THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

<sup>50</sup> The events of 1995 are recounted in detail in ELIZABETH DREW, *SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE* (1996), on which the following summary is substantially based.

<sup>51</sup> For example, a Los Angeles Times Poll National Survey, conducted January 19–22, 1995, asked 1,353 adults nationwide if they would favor cuts in spending for a variety of purposes. By the margins indicated, respondents *opposed* cuts in the following: Medicare (88–9), Social Security (86–12), Medicaid (73–20), and the environment (67–27). Public Opinion on The Contract, at <http://oregonstate.edu/instruct/ps102/tutorial/congress/opinion.html#Poll1> (last visited Sept. 6, 2003). A November, 1995 CNN/USA Today/Gallup Poll found that Americans, by a 48 to 38 percent margin, thought it more important to protect Medicare funding than to balance the budget. CNN, *Americans blame GOP for budget mess*, Nov. 15, 1995, at [http://www.cnn.com/US/9511/debt\\_limit/11-15/poll/poll\\_txt.html](http://www.cnn.com/US/9511/debt_limit/11-15/poll/poll_txt.html) (last visited Sept. 6, 2003) [hereinafter CNN].

<sup>52</sup> George Hager, *Day by Day: Talks Wax and Wane . . . as Anger, Miscues Punctuate Week*, 53 CONG. Q. WKLY. REP. 3876 (Dec. 23, 1995); George Hager, *A Battered GOP Calls Workers Back to Job*, 54 CONG. Q. WKLY. REP. 53 (Jan. 6, 1996).

<sup>53</sup> George Hager, *Congress, Clinton Yield Enough to Close the Book on Fiscal '96*, 54 CONG. Q. WKLY. REP. 1155 (Apr. 27, 1996).

<sup>54</sup> *Id.*



The government shutdowns were required by the Antideficiency Act,<sup>55</sup> a statute enacted after the Civil War to enforce Congress's appropriations role. The Act provides that, with a few exceptions, government agencies may not incur any obligation to spend government money before that money is appropriated.<sup>56</sup> Following a series of disputes over Federal Trade Commission authorization in the late 1970s, President Carter's second Attorney General, Benjamin Civiletti, attributed to the Antideficiency Act its obvious implication: should Congress fail to appropriate any funds for an agency, or should an existing appropriation lapse altogether, the Antideficiency Act requires the agency to shut its doors.<sup>57</sup>

Typically, this is not a serious threat. Although Congress hardly ever completes its appropriations work on time for the start of the next fiscal year, it routinely prevents intervening lapses in appropriations through "continuing resolutions," appropriations bills that usually extend an agency's existing level of spending until a final appropriation is enacted.<sup>58</sup> Given the contentiousness of budget policy and the persistence of divided government during most of the post-Vietnam Era, Congress did experience shutdowns prior to 1995, but none of any real consequence. There were a total of seven brief shutdowns from 1985-1995, but five occurred wholly over weekends and none involved layoffs for more than a single weekday.<sup>59</sup>

The 1994 elections, however, resulted in a Republican takeover of both houses of Congress for the first time in 40 years. Republican Speaker-Designate Newt Gingrich announced that House Republicans would offer a plan to balance the federal budget within seven years.<sup>60</sup> Clinton countered with a target of ten years.<sup>61</sup> Gingrich pressed ahead despite strong popular support for key programs that Republicans planned to target for cuts to achieve a balanced budget within their more

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<sup>55</sup> 31 U.S.C. §§ 1341, 1342, 1349-1351, 1511-1519 (2002) (originally enacted as Anti-Deficiency Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251).

<sup>56</sup> *Id.* § 1341(a)(1).

<sup>57</sup> See *Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation*, 4A Op. Off. Legal Counsel 16 (1980). Civiletti later determined that the Antideficiency Act permits departments and agencies to terminate operations in an orderly way upon a lapse in appropriations. A second Civiletti opinion provided more detailed guidance on Antideficiency Act implementation. See *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 43 Op. Att'y Gen. 293 (1981), *construed in* 5 Op. Off. Legal Counsel 1, 10 n. 12 (1981). See also *Continuation of Federal Prisoner Detention Efforts in the Face of a USMS Appropriation Deficiency*, Op. Off. Legal Counsel (Apr. 5, 2000) (preliminary print), *available at* 2000 WL 33155726.

<sup>58</sup> PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 185 (1996).

<sup>59</sup> DREW, *supra* note 50, at 301, 324.

<sup>60</sup> *Id.* at 128.

<sup>61</sup> *Id.* at 225.

ambitious time frame.<sup>62</sup> Against the certainty of these cutbacks, the public apparently was not persuaded that a stand on seven versus ten years implicated any important issue of principle.<sup>63</sup> Moreover, because the final GOP proposal included \$270 billion in Medicare cuts and \$245 billion in tax cuts, Republicans created the impression that they were less interested in a balanced budget than in reducing funding to programs with which the Democrats had long been identified.<sup>64</sup> House Republicans aggravated their public relations problems by trying to graft onto appropriations bills a variety of right-wing riders on environmental policy.<sup>65</sup> Enough Republican moderates felt compelled to abandon these riders to enable the Democrats to prevail, at least temporarily, on these environmental policy issues in a closely divided House.<sup>66</sup>

The Republicans' maladroitness in handling their impasse with a Democratic President—and the aggressiveness of Speaker Gingrich, in particular—exacerbated the public perception that the House was looking to pick a fight, rather than to reach a reasonable resolution on fiscal policy. Although Fiscal Year 1995 would not end until September 30, 1995, Gingrich was threatening as early as May, 1995 to shut down the executive branch if Clinton did not back down.<sup>67</sup>

As it happens, this was not the first occasion in recent decades when a house of Congress threatened to cut off appropriations across the board in order to force Presidential agreement on a contested matter of policy. But the comparison between this and the prior occasion only demonstrates how dramatically the 1995 budget shutdown departed from conventional inter-branch practice. In June, 1973, the Democratic Senate Majority Leader Mike Mansfield told President Nixon he would block passage of any major appropriations bill for the next fiscal year—which, at the time, would begin the following July 1—unless Nixon agreed to a ban on any further funding for military operations in Southeast Asia.<sup>68</sup> Nixon relented.<sup>69</sup> Mansfield had substantial bipartisan backing for his

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<sup>62</sup> See *supra* note 51.

<sup>63</sup> In November, 1995, a national poll indicated that Americans believed, by a 52-37 percent margin, that the budget debate was mostly an attempt by both sides to gain political advantage before the 1996 election, rather than an important battle over principles. That Clinton had a better political sense of Americans' priorities is suggested by the further finding that, by a 49-26 percent vote, Americans also put more of the blame on Republican leaders in Congress than on Clinton for the shutdown of the federal government. See CNN, *supra* note 51.

<sup>64</sup> See DREW, *supra* note 50, at 242.

<sup>65</sup> *Id.* at 256-57, 260-66.

<sup>66</sup> See *id.* at 264-267.

<sup>67</sup> See *id.* at 214.

<sup>68</sup> WILLIAM BUNDY, *A TANGLED WEB: THE MAKING OF FOREIGN POLICY IN THE NIXON PRESIDENCY 389-90* (1998).

<sup>69</sup> *Id.*

stance.<sup>70</sup> Public support for rapid troop withdrawals from Vietnam had been growing since the late 1960s.<sup>71</sup> Nixon's approval rating during the second quarter of 1973 stood at 44 percent, and was heading downward as a result of the unfolding Watergate investigation.<sup>72</sup> Thus, although Mansfield's threat was a portentous exercise of checks and balances brinksmanship, he could plausibly assert the necessity of that strategy to achieve the democratic aims that underlie checks and balances.<sup>73</sup>

A threat not to appropriate any money for the executive branch is, under any circumstances, the equivalent of nuclear blackmail in a checks and balances system.<sup>74</sup> The 1973 Senate was ready to throw down the gauntlet on behalf of a growing bipartisan consensus against a largely discredited President. The 1995 Republicans tried the same tactic on a strictly party-lines basis, against the weight of public sentiment. For structural reasons, however, democratic electoral remedies for antidemocratic assaults on checks and balances of the kind attempted in 1995 can easily prove unavailing.<sup>75</sup> Thus, while it is always problematic for any branch to threaten the core functioning of a coordinate branch,

<sup>70</sup> *Id.*

<sup>71</sup> BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES* 234–237 (1992).

<sup>72</sup> USAToday, *Approval Ratings from Ike through Clinton* (Jan. 14, 1996), at <http://www.usatoday.com/elect/eq/eqleg.062.htm> (last visited Oct. 1, 2002) (on file with author).

<sup>73</sup> Professor Prakash argues that to ascribe any legitimacy to Mansfield's move "eviscerates" the idea that there is a genuine anti-defunding norm because "[m]eaningful norms exist only if they are strong enough to withstand temptations to dog-pile on a politically unpopular branch." Prakash, *supra* note 8, at 550. I disagree. A norm is no less a norm for being situational. In the Mansfield case, the salient point is not just that the President was unpopular, but that the Senate's threat to withhold appropriations was bipartisan; a majority of Republicans, as well as Democrats, supported cutting off appropriations to support military activity in Cambodia. BUNDY, *supra* note 68, at 389. A norm that says, in effect, "Neither House of Congress shall threaten to withhold all appropriations from the executive branch except in circumstances where (a) a bipartisan majority in that House supports an initiative that the President is resisting; (b) the American people support Congress; and (c) the President has undermined his own legitimacy by attempting to forestall an investigation whether the White House was complicit in a felonious effort to undermine the integrity of the prior presidential election," strikes me as a fairly robust and useful norm.

<sup>74</sup> Professor Prakash suggests that the Republicans' budgetary brinksmanship of 1995 was no different from the Democrats' use of omnibus appropriations bills in the 1980s to force President Reagan to swallow appropriations measures he would not otherwise have supported. Prakash, *supra* note 8, at 550. I disagree. Presumably, the absence of a line-item veto has meant that Congress has forced every President to accede to some of the legislative branch's spending priorities rather than his own, and the use of omnibus appropriations bills made matters worse. In no other recent case, however, did Congressional leaders stake out the position that a government shutdown would be a worthwhile price to pay for the failure of the branches to reach acceptable compromise. Congressional Democrats did not make that threat against President Reagan. As for whether the 1995 shutdowns were caused by the Republicans' insistence on their position or Clinton's refusal to acquiesce, I think the overwhelming public ascription of responsibility to the Republicans for this fiasco provides the historically accurate and politically relevant answer.

<sup>75</sup> See discussion *infra* pp. 533–540.

inter-branch aggression for political goals that lack popular support pose a special threat to democratic legitimacy.

C. SUBJUGATING THE PRESIDENT TO CONGRESSIONAL CONTROL: THE CLINTON IMPEACHMENT

The impeachment and trial of President William Jefferson Clinton will rank throughout history as one of our most bizarre political episodes. Before briefly summarizing the key events—and no short summary can do justice to such an outlandish tale—I will state the bottom line: This episode, a genuinely dangerous drain on the time and energy of the federal executive, was a wholly unjustified, and thoroughly partisan, use of one of Congress's most extreme potential powers against the executive.<sup>76</sup> Whatever its proximate causes—and these include President Clinton's now-admitted lying to a federal grand jury—the episode marked most of all the sputtering end of an unrelenting campaign to undermine the Clinton Presidency. That effort arguably began the moment elections returns from November, 1992 were announced.

By December, 1998, when the House of Representatives voted in favor of Articles of Impeachment against President Clinton, two key subplots designed to terminate the Clinton Presidency had developed.<sup>77</sup> One was the Whitewater Investigation, a prolonged special prosecutor investigation into a nearly impenetrable series of allegations regarding the peripheral involvement of President Clinton and his wife, Hillary Rodham Clinton, in a series of Arkansas business dealings dating back to the late 1970s.<sup>78</sup> Twelve people ultimately were convicted of a variety of offenses in connection with the Whitewater real estate venture and the related failure of the Madison Guaranty Savings and Loan Association.<sup>79</sup> In January, 1994, notwithstanding a lapse in the federal independent counsel statute,<sup>80</sup> Attorney General Janet Reno appointed Republican Robert Fiske to investigate the Whitewater events as a special prosecu-

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<sup>76</sup> The only comparably threatening power is the power to withhold appropriations, discussed *supra* in Section II-B.

<sup>77</sup> My summary relies largely on TOOBIN, *supra* note 1, and his immensely helpful chronology compiled at xvii-xxii.

<sup>78</sup> TOOBIN, *supra* note 1, at 61-81.

<sup>79</sup> Bill Miller, *Ray: Clintons Will Not Face Charges From Whitewater*, at [www.washingtonpost.com](http://www.washingtonpost.com) (Sept. 20, 2000) (on file with author). See also Jonathan Karl, *Starr Hits Four-Year Anniversary* (Aug. 5, 1998), at <http://www.cnn.com/ALLPOLITICS/1998/08/05/starr.anniversary/index.html> (last visited April 17, 2003).

<sup>80</sup> The Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824 (1978), which created the statutory office of special prosecutor (later changed to "independent counsel"), was reauthorized for an additional five years in 1983, Pub. L. 97-409, 96 Stat. 2039 (1983), and then, again, for another five years in 1987, Pub. L. 100-191, 101 Stat. 1293 (1987). Given President George H.W. Bush's opposition to the law, it was allowed to lapse in 1992, but was then reauthorized by the Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 108 Stat. 732 (1994).

tor.<sup>81</sup> Following the June, 1994 reauthorization of that statute, a special division of the U.S. Court of Appeals for the D.C. Circuit replaced Fiske with Kenneth Starr as independent counsel.<sup>82</sup> After an investigation that lasted more than six years, Starr's successor, Robert W. Ray, announced that neither of the Clintons would face any charges relating to the Whitewater matter.<sup>83</sup>

It is worth noting, especially in light of the Clintons' exoneration, that, as early as January, 1994, Representative Richard Armey of Texas, then chairman of the House Republican Conference, was quoted as saying that impeachment was "not outside the realm of possibility or probability" because of the Whitewater affair.<sup>84</sup> By March, 1994, Phil Gramm, a Republican Senator from Texas, was comparing Whitewater to Watergate,<sup>85</sup> and a Republican Senator from New York, Alphonse D'Amato, said the Whitewater matter had "the potential of being as great if not greater than Watergate."<sup>86</sup> In retrospect, such early speculation as to the magnitude of the Whitewater matter and its possible implications for the presidency seems to presage the congressional Republicans' eagerness to use the impeachment process for political ends.

The second subplot (or combination of subplots) involved allegations against Clinton for sexual misconduct.<sup>87</sup> In May, 1994, a former Arkansas state employee, Paula Jones, sued President Clinton for allegedly sexually harassing her in 1991, when Clinton was still governor of Arkansas.<sup>88</sup> In May, 1997, the U.S. Supreme Court rejected President Clinton's claim that Presidents ought to be immune, while in office, from civil lawsuits arising from alleged misconduct that occurred prior to taking office as President.<sup>89</sup> As the suit proceeded, Jones's lawyers were tipped that, from 1995 to 1997, President Clinton had engaged in an extramarital sexual relationship with Monica Lewinsky, a former White House intern.<sup>90</sup> In January, 1998, both Lewinsky and President Clinton denied the affair, and the Special Division of the D.C. Circuit responsible

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<sup>81</sup> TOOBIN, *supra* note 1, at xvii.

<sup>82</sup> *Id.* at xvii-xviii.

<sup>83</sup> ROBERT W. RAY, FINAL REPORT OF THE INDEPENDENT COUNSEL IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION REGARDING MONICA LEWINSKY AND OTHERS, filed with the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, Division No. 94-1 (2001), available at <http://icreport.access.gpo.gov/lewinsky.html> (last visited April 17, 2003).

<sup>84</sup> Lars-Erik Nelson, *Whitewater Is Clinton's Blind Alley*, NEWSDAY, Jan. 9, 1994, at 34, available at 1994 WL 7426686.

<sup>85</sup> Paul West, *Whitewater: Shades of Watergate?*, BALTIMORE SUN, Mar. 13, 1994, at 1E, available at 1994 WL 6914195.

<sup>86</sup> *Id.*

<sup>87</sup> This account is based on the chronology in TOOBIN, *supra* note 1, at xvii-xxii.

<sup>88</sup> TOOBIN, *supra* note 1, at xvii.

<sup>89</sup> Clinton v. Jones, 520 U.S. 681 (1997).

<sup>90</sup> TOOBIN, *supra* note 1, at 163-66.

for appointing and overseeing counsel extended Kenneth Starr's jurisdiction to consider whether Lewinsky and others had perjured themselves or suborned perjury in connection with the Jones case.<sup>91</sup> A day later, President Clinton denied his relationship with Lewinsky in a videotaped deposition.<sup>92</sup>

Following the dismissal of *Jones v. Clinton*<sup>93</sup> on a motion for summary judgment, Starr subpoenaed President Clinton to testify in front of a federal grand jury.<sup>94</sup> During that testimony, Clinton acknowledged his affair, but denied that he had lied or withheld evidence, or urged others to do so.<sup>95</sup> Less than a month later, Starr submitted an extensive report, widely noted for some of its more prurient details, to Congress.<sup>96</sup> On September 11, the House voted to release the report, and on October 8, voted 258–176 for an impeachment investigation.<sup>97</sup> That investigation ultimately resulted in the House Judiciary Committee's approval of four Articles of Impeachment all by straight party-line vote, except for the article alleging perjury in the Paula Jones deposition, which Republican Representative Lindsey Graham, a former criminal prosecutor, voted against.<sup>98</sup> On December 19, the lame-duck House passed the article alleging grand jury perjury by a vote of 228–206, with five Democrats supporting the article and five Republicans opposing it.<sup>99</sup> An obstruction of justice article passed 221 to 212, but likely would have been defeated if the vote had been held upon the seating of the 106th Congress, in which the Democrats held five more seats.<sup>100</sup> The two other articles, alleging perjury in the Jones deposition and misstatements in Clinton's written responses to Judiciary Committee questions, were both rejected.<sup>101</sup> On February 12, 1999, the Republican-controlled Senate voted to acquit Clinton by votes of 55–45 on the perjury count, and 50–50 on the obstruction of justice count.<sup>102</sup> The Republicans, who would have needed 67 votes to prevail,<sup>103</sup> could not achieve a clear majority on either article, even in a Senate in which they held 55 seats.

Substantial legal arguments exist that the House of Representatives exceeded its constitutional authority in impeaching Clinton because the

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<sup>91</sup> *Id.* at xx.

<sup>92</sup> *Id.*

<sup>93</sup> 990 F.Supp. 657 (E.D. Ark. 1998).

<sup>94</sup> TOOBIN, *supra* note 1, at xxi.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 360.

<sup>99</sup> *Id.* at 367.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 367.

<sup>102</sup> *Id.* at 390.

<sup>103</sup> See U.S. CONST. art. I, § 3, cl. 6.

acts alleged did not amount to "high crimes and misdemeanours," the constitutional standard for impeachable offenses.<sup>104</sup> The argument here, however, does not turn on that legal question. After all, what made Congress's behavior in the 1995 budget battle improper was not that it transgressed any express legal limitation on the appropriations power, but rather that Congress was pushing its arguably lawful authority to a point at which it was threatening to undermine the system of checks and balances contemplated by the Constitution. In a similar way, by impeaching Clinton, the Republican Congress was risking, perhaps even seeking, the destabilization of a coordinate branch of government, although Clinton's alleged misconduct obviously had not put at risk the welfare of the nation or the strength of our constitutional system. From a constitutional standpoint, comparisons between Whitewater or Monica-gate, on one hand, and Watergate, on the other, are frivolous. The conduct involved in the Watergate conspiracy threatened the integrity of a presidential election. At most, Clinton's misconduct threatened the integrity of a federal proceeding, the chief appeal of which to many of its funders and supporters was the hope of delegitimizing the Clinton presidency.<sup>105</sup> Accordingly, the Republicans never managed to arouse anything close to majority public support for the impeachment,<sup>106</sup> and President Clinton's approval ratings rose to astonishing peacetime levels as the proceedings against him intensified.<sup>107</sup>

Indeed, the Clinton impeachment does not compare favorably even to the one other impeachment effort that resulted in a vote of the full House of Representatives, the long-discredited impeachment of Andrew Johnson. As in the Clinton impeachment, the House had irresponsibly raised the specter of converting the Presidency into an office to be held at the political pleasure of the legislative branch—in other words, an "impeachment-alization" of political differences." The charges were no less dubious and the political motivation no less conspicuous. On the other hand, the Radical Republicans of 1868 might at least have argued that they were fighting to preserve the meaning of the Civil War, to prevent

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<sup>104</sup> Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143, 148–54, 150 n. 36

<sup>105</sup> See generally TOOBIN, *supra* note 1, at 3–167.

<sup>106</sup> See Linda Feldmann, *Democrats Hope for a Boost from Impeachment Fallout*, CHRISTIAN SCIENCE MONITOR, Dec. 29, 1998, at 1, available at 1998 WL 2372928 ("[T]he GOP has handed the Democrats a campaign issue they believe could tip some seats their way in 2000: the impeachment of President Clinton, a move the majority of the public opposed.").

<sup>107</sup> President Clinton's approval ratings hovered in the "in the high 50s and low 60s" throughout 1997, but jumped to 69 percent after news first broke of the Monica Lewinsky investigation. It remained in the 60s throughout the year and spiked to 73 percent after the House voted for impeachment. *USA TODAY/CNN/Gallup Poll Results: A Year-By-Breakdown of President Clinton's Job Approval Ratings in the CNN/USA Today/Gallup Poll*, at <http://www.usatoday.com/news/poll020.htm> (Jan. 21, 2000).

an unpopular, unelected President from undoing the pro-democracy work of Reconstruction. Like Mike Mansfield, they might have claimed to have democracy (if not bipartisanship) on their side.<sup>108</sup> The Republicans of the 106th Congress could make no such claim.

One reason the Republican effort failed was the prevalent public understanding that the Republicans had been trying to undermine the Clinton Presidency on virtually any available ground since January 20, 1993. Contemporaneous expressions of the Republicans' attitudes towards Clinton substantiate the point. Less than three weeks into the Clinton presidency, a former Justice Department official, later to become a law school dean, Douglas Kmiec, declared that Clinton would be committing an impeachable offense if, without a change in federal family planning law, he were to adopt administrative regulations providing federal aid to clinics that conducted abortion counseling.<sup>109</sup> Of course, under this reasoning, presidents would be impeachable whenever any federal agency is found by a court of law to have overstepped its statutory jurisdiction in the implementation of any federal statute—an absurd suggestion. Given Dean Kmiec's credentials—he had been an assistant attorney general in charge of the Office of Legal Counsel under President Bush—these statements can be understood only as a triumph of ideology over good sense, and as testimony to the Republicans' early hopes of ousting Clinton.

At least it can be said of Dean Kmiec's eagerness to threaten Clinton with removal that he waited for the Clinton Presidency to begin before attacking its legitimacy. In contrast, following President Bush's concession to Clinton on election night, Robert Dole, the leader of the Republican minority in the Senate, immediately attacked the legitimacy of Clinton's claim to governance authority: "Fifty-seven percent of . . . Americans . . . voted against Bill Clinton, and I intend to represent that majority on the floor of the U.S. Senate."<sup>110</sup> The impeachment and trial of President Clinton should be seen as the culmination of the Republicans' longstanding desire not merely to oppose Clinton politically, but to undermine his presidency more fundamentally. Although the impeachment failed, it still stands as a dangerous institutional precedent for seeking to remove a President based on partisan animus, rather than the welfare of the constitutional system. The diversion of the President's time, energy, and attention in defending against such an effort amounted to an inexcusable assault on inter-branch norms.

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<sup>108</sup> See *infra* text accompanying notes 68–73.

<sup>109</sup> Harry Stainer, *Clinton Risks Breaking Law, Professor Says*, CLEVELAND PLAIN DEALER, Feb. 5, 1993, at 7C, available at 1993 WL 4271247.

<sup>110</sup> *For the Record*, WASH. POST, Nov. 6, 1992, at A26, available at 1992 WL 2157990. This an interesting remark to recall when we are governed by a Republican President who did not even garner a plurality popular vote.



## D. USURPING THE APPOINTMENTS POWER: THE STONEWALLING OF CLINTON JUDGES

Although Iran-Contra, the 1995 budget showdown, and the Clinton impeachment provide ominous signals for inter-branch "forbearance," there is no evidence that these particular forms of inter-branch aggression will re-occur or, with one possible exception,<sup>111</sup> that they have initiated a cycle of counterattack by the Democrats. The last episode I wish to cite—the Republican Senate's attempt to hijack Clinton's power of judicial appointments—is of a different order. It has triggered an escalation of defensive measures that are breaking down a series of longstanding norms of cooperation between the majority and minority parties in the United States Senate, and there appears to be no hope of return to these norms.

In a time of divided government, Americans would normally expect some inter-branch accommodation in the process of judicial nominations. For instance, one would expect the President to nominate judges of a more centrist background, whose confirmation would pose less political difficulty for the opposition party than nominees more representative of the President's own activist base. President Clinton followed this pattern. One nonpartisan study after another has confirmed the "moderation" of his appointees, who, for example, in criminal justice cases, were more likely than President George Bush's appointees to rule for the defendant, but notably less likely to do so than President Carter's appointees.<sup>112</sup> Conservative legal commentator and Supreme Court scholar Bruce Fein has candidly characterized Clinton's nominees as being "as centrist as can be."<sup>113</sup>

Senate Republicans, however, did not respond to Clinton's moderation with their own. The Clinton Administration extended to the chairman of the Senate Judiciary Committee, Utah's Orrin Hatch, a virtually

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<sup>111</sup> It is arguable that the then singular aggressiveness of Senate Democrats' opposition to President Reagan's 1987 nomination of Robert Bork of the Supreme Court is best understood, at least in part, as a counter-attack in response to the Reagan Administration's overreaching in the Iran-Contra Affair.

<sup>112</sup> See, e.g., Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 17, 19 (1996). In civil rights and civil liberties cases, President Clinton's first-term district court appointees voted for the "liberal" position at a rate identical to President Ford's appointees. *Id.* at 19. See also Nancy Scherer, *Are Clinton's Judges "Old" Democrats or "New" Democrats?*, 84 JUDICATURE 150 (2000); Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265 (1999) [hereinafter *Second Term*]; Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997) [hereinafter *First Term*].

<sup>113</sup> David Byrd, *Clinton's Untilting Federal Bench*, NAT'L J., Feb. 19, 2000, at 555, available at 2000 WL 6436835.

unprecedented consultative role in the nomination process.<sup>114</sup> Nonetheless, Republican Senators subjected Clinton nominees to “an unprecedented slowdown of the confirmation process,”<sup>115</sup> and, during the last two years of the Clinton Administration, tried to hold open as many vacancies as possible, often arguing that no new judges were needed for particular courts.<sup>116</sup>

The Republicans’ obstructionism is dramatic whether one looks at the number of nominees blocked, delays in securing Judiciary Committee hearings, or delays in securing floor votes following recommendations by the Judiciary Committee. For example, during the final year of President Clinton’s first term, Senate Republicans confirmed only 17 Clinton nominees, compared to 66 nominees of President George H.W. Bush who were confirmed by Senate Democrats in 1992.<sup>117</sup> Democrats subjected George H.W. Bush’s federal district court nominees to an average of 92 days’ delay after their nomination before granting them hearings.<sup>118</sup> In contrast, during the first half of Clinton’s second term, Republicans delayed hearings for Clinton’s district court nominees an average of 161 days.<sup>119</sup> These averages do not include nominees denied a hearing altogether.<sup>120</sup> At the end of the 106th Congress, 40 nominees remained stalled in the Senate Judiciary Committee, 36 of whom had never been granted a hearing.<sup>121</sup>

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<sup>114</sup> See *First Term*, *supra* note 112, at 254, 256.

<sup>115</sup> See *Second Term*, *supra* note 112, at 267.

<sup>116</sup> Elizabeth A. Palmer, *Longstanding Judicial Vacancies Revive ‘Smaller is Better’ Crusade*, 58 CONG. Q. WKLY. REP. 521, 523 (Mar. 11, 2000) (reporting on refusal by Senator Helms to consent to a hearing for African-American judicial candidates for the Fourth Circuit, or a hearing on any candidate for a North Carolina vacancy). President G. W. Bush ultimately re-submitted the nomination of Judge Roger L. Gregory, an African-American jurist first nominated by President Clinton to a Virginia vacancy on the Fourth Circuit, and to whom Clinton gave a recess appointment when the Senate refused to move forward on the Gregory nomination. Also among President G. W. Bush’s first nominees to the federal appellate courts was U.S. District Court Judge Terrence Boyle, to fill the North Carolina vacancy.

President G.W. Bush also moved quickly to nominate candidates to two vacant seats on the D.C. Circuit, which Senate Republicans had held open since 1995. Republican Sen. Charles E. Grassley (R-Iowa), who presided over a series of hearings in the 1990s to demonstrate why the federal judiciary should be smaller, had said of these seats: “Filling either of these . . . would be a waste of taxpayer money.” Amy Goldstein & Neely Tucker, *Bush Plans to Add 2 Judges to Key Court; Senate GOP for Years Blocked Filling All Seats*, WASH. POST, Dec. 15, 2002, at A01, available at 2002 WL 104306468.

<sup>117</sup> Sheldon Goldman et al., *Clinton’s Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 233 (2001) [hereinafter *Legacy*].

<sup>118</sup> *Id.* at 234.

<sup>119</sup> *Id.* (“During the last two years of Clinton’s presidency, the average time to confirmation dropped to 97 days, a marked improvement on the surface but these figures are for nominees confirmed and, consequently, they do not take account of the large number of Clinton nominees who did not have Judiciary Committee hearings”).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 233–34.

The same discrepancy appears for floor votes. Democrats confirmed former President George Bush's appellate nominees an average of 14 days after a recommendation from the Senate Judiciary Committee.<sup>122</sup> In the three Republican Congresses between 1995 and 2000, the average floor delay for Court of Appeals confirmations was 40 days, 42 days, and 68 days, respectively.<sup>123</sup> A similar pattern holds for district court judges.<sup>124</sup>

Perhaps the starkest episode of the Republicans' determination to prevent the Clinton Administration from filling judicial vacancies was the 1999 defeat on the floor of the Senate of Missouri Supreme Court Justice Ronnie White, who had been nominated to a U.S. District Court seat in Missouri.<sup>125</sup> The vote marked the first time since the defeat of Judge Robert Bork's nomination for the U.S. Supreme Court in 1987 that any judicial candidate had lost a vote on the floor of the Senate, and was the first floor defeat of a candidate for a district court judgeship in recent memory. Notwithstanding a clearly centrist record in criminal procedure cases, Justice White had been labeled "pro-criminal and activist" by then-Missouri Senator John Ashcroft.<sup>126</sup> White was defeated on a party-lines 55-45 vote.<sup>127</sup>

In January, 2001, the parties found themselves in control of institutions at different ends of Pennsylvania Avenue. It might have been expected for Republican President George W. Bush—who had not won even a plurality of the popular vote—to emulate President Clinton's centrism and accommodate the Democrats' Senate majority by withholding nominations of conspicuously right-wing activists in favor of more moderate Republicans. However, he did he waste any time in nominating conservative Republican judicial candidates for slots that, during the Clinton Administration, Republican Senators and other conservative judges insisted there was no need to fill.<sup>128</sup>

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<sup>122</sup> *Id.* at 235-36.

<sup>123</sup> *Id.* at 236.

<sup>124</sup> *Id.* at 235.

<sup>125</sup> Stuart Taylor, Jr., *The Shame of the Ronnie White Vote*, NAT'L J., Oct. 16, 1999, at 2949.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> On May 9, 2001, President Bush nominated U.S. District Court Judge Terrence Boyle to fill a North Carolina vacancy on the Fourth Circuit despite the earlier refusal of North Carolina Senator Jesse Helms to allow a hearing on any such nominee during the second Clinton Administration. Boyle had served as Legislative Assistant to Senator Helms before his appointment to the District Court. Biography of Terrence W. Boyle, at <http://www.justice.gov/olp/boylebio.htm> (last visited Sept. 2, 2003). On the same date, President Bush nominated attorneys John Roberts and Miguel Estrada to vacancies on the District of Columbia Circuit that Republican Senator Charles S. Grassley had insisted it would be a waste of money to fill. See Goldstein and Neely, *supra* note 116. Among his prior legal positions, Mr. Roberts had been an Associate Counsel to the President under President Reagan and Principal Deputy So-

The Democrats responded by tying up some of these nominations in the Judiciary Committee. Texas judge Priscilla Owen was voted down in committee.<sup>129</sup> Washington, D.C. lawyer Miguel Estrada was not given a committee vote because of the Administration's unwillingness to share legal memoranda he prepared on constitutional issues while serving in the Office of the Solicitor General.<sup>130</sup> Yet, on the whole, Democrats were not as rigid in the 107th Congress towards Bush's nominees as the Republicans had been towards Clinton's in the 106th.<sup>131</sup>

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licitor General under President George H.W. Bush. Biography of John G. Roberts, at <http://www.justice.gov/olp/robertsbio.htm> (last visited Sept. 2, 2003). Although he has not held a political appointment in government, opponents of Mr. Estrada's nomination have characterized him as a conservative based on the organizations and cases with which he has been associated. ALLIANCE FOR JUSTICE, REPORT ON MIGUEL ESTRADA, NOMINEE TO THE US COURT OF APPEALS FOR THE DC CIRCUIT (2002), available at [http://www.allianceforjustice.org/judicial/research\\_publications/research\\_documents/estrada\\_full\\_report.pdf](http://www.allianceforjustice.org/judicial/research_publications/research_documents/estrada_full_report.pdf) (Sept. 26, 2002). Senate Republicans did not grant hearings to President Clinton's nominees to these two vacancies, Elana Kagan and Allen R. Snyder, who were nominated on June 17 and September 22, 1999, respectively. Press Release, White House Office of the Press Secretary, President Clinton Nominates Three to the Federal Bench 6/17/99 (June 18, 1999), available at 1999 WL 402708; Press Release, White House Office of the Press Secretary, Members Named to the Federal Bench 09/22/99 (Sept. 22, 1999), available at 1999 WL 740762.

<sup>129</sup> David G. Savage, *Bush Court Nominee Is Voted Down*, L.A. TIMES, Sept. 6, 2002, at A17, available at 2002 WL 2501667.

<sup>130</sup> Charles Lane, *Lawmakers Press Nominee; Democrats Seek Justice Memos, Challenge Estrada's Credibility*, WASH. POST, Sept. 27, 2002, at A05, available at 2002 WL 101064029.

<sup>131</sup> Higher percentages of Bush's district court nominees got committee hearings, they waited shorter periods on average to have their hearings and to have their nominations reported to the floor, and they were confirmed at a greater rate. The same is true for the appellate court nominees, except that their average wait from nomination to hearing was 3 days longer. In almost all respects, the Democrats also treated Bush nominees better on the Senate floor in terms of the time between when nominees were reported out of committee and confirmed by the Senate. Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 253-56 (2003) [hereinafter *Obstruction and Delay*].

It is a sign of the escalating erosion of inter-branch comity, however, that the Democratic Senate treated President George W. Bush far less favorably in his first two years of office as compared to the initial two years of other Presidents' service. Thus, for example, during the first two years served by Presidents Reagan, George H.W. Bush, and Clinton, the Senate returned 4, 4, and 14 judicial nominations, respectively. The Senate returned 36 nominations under the current Administration. *Judicial Nominations Returned During the First Two Years of Recent Congresses*, at <http://www.usdoj.gov/olp/returnednoms.pdf> (last visited Sept. 6, 2003). Likewise, although President George W. Bush saw a larger number of his judicial nominees (100) confirmed than did Presidents Carter, Reagan, or George H.W. Bush, his rates for confirmation were considerably lower. *Circuit and District Court Judicial Nominations, First Two Years of Recent Administrations*, at <http://www.usdoj.gov/olp/2yearcomparison.pdf> (last visited April 18, 2003). Bush's confirmation rates resemble more closely the Senate's performance during the first two years of Clinton's second term. That is, his rates of confirmation for district and appellate judges were 84 and 53 percent, respectively, *id.*, as compared to Clinton's 84 and 68 percent. *Legacy*, *supra* note 117, at 231. This strongly suggests that inter-party relations had so deteriorated during the second Clinton Administration that Senate Democrats viewed the 107th Congress as a continuation of an ongoing struggle, rather than the beginning of a new era.

Consider the following case in point. On February 9, 2000, President Clinton nominated Robert Cindrich, a well-regarded moderate Pittsburgh federal trial judge, to a seat on the Third Circuit Court of Appeals, which had become vacant on June 30, 1999.<sup>132</sup> With nearly a full year left in the Clinton Administration, Republicans in charge of the Senate Judiciary Committee refused to grant the uncontroversial Cindrich a hearing.<sup>133</sup>

On September 10, 2001, President George W. Bush nominated Johnstown federal trial judge D. Brooks Smith to the same seat.<sup>134</sup> It took the Democratic-led Judiciary Committee over eight months to vote on the nomination, in large part because of questions whether Judge Smith held mainstream views on constitutional federalism and whether he broke a 1989 promise to the Judiciary Committee to resign from or reform a sex-discriminatory private club upon his confirmation to the district court.<sup>135</sup> The point is, however, that Senate Democrats did grant Judge Smith both a hearing and a committee vote, and he was confirmed.<sup>136</sup>

The restoration of Republican control in the Senate in 2003, however, both intensified the campaign by the Bush Administration and by Senate Republicans to appoint conservative activists to judicial vacancies and prompted a corresponding strengthening of Democratic resistance. The Democrats began pushing to new lengths one of the few clear powers a Senate minority can use to force compromise—the filibuster.<sup>137</sup> The Republicans, for their part, are disregarding norms of comity upon which they had successfully relied to get leverage over judicial appointments in the Clinton Administration. For example, while chairman of the Senate Judiciary Committee under President Clinton, Senator Orrin Hatch refused to hold a hearing on any candidate unless he received a “blue slip” from both of the judicial candidate’s home-state Senators,

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<sup>132</sup> Press Release, White House Office of the Press Secretary, President Clinton Nominates Robert J. Cindrich, Kent R. Markus, John Antoon II, and Phyllis J. Hamilton to the Federal Bench, at <http://clinton6.nara.gov/2000/02/2000-02-09-president-clinton-nominates-four-to-the-federal-bench.html> (Feb. 9, 2000).

<sup>133</sup> Sen. Patrick Leahy, Statement on the Nomination of Judge D. Brooks Smith to be a Judge on the United States Court Of Appeals for the Third Circuit, at <http://leahy.senate.gov/press/200205/052302.html> (May 23, 2003).

<sup>134</sup> See U.S. Dept. of Justice Office of Legal Policy, *Nominations During the 107th Congress*, at <http://www.usdoj.gov/olp/nominations107.htm> (last visited April 22, 2003).

<sup>135</sup> David G. Savage, *Panel Backs Bush's Judicial Nominee*, L.A. TIMES, May 24, 2002, at A20, available at 2002 WL 2477920.

<sup>136</sup> See Confirmed Nominees During the 107th Congress, at <http://www.justice.gov/olp/confirmed107.htm> (last visited Sept. 2, 2003).

<sup>137</sup> Jennifer A. Dlouhy, *More Judicial Nominee Battles Likely as Wins Fuel Both Parties' Resolve*, 61 CONG. Q. WKLY REP. 1034 (May 3, 2003).

indicating that each Senator had agreed to the hearing.<sup>138</sup> During the George W. Bush Presidency, Hatch has abandoned this requirement, expressing a willingness to proceed based on a single Senator's approval.<sup>139</sup>

The phenomenon of retaliatory norm erosion is well illustrated by the case of Miguel Estrada, nominated by President George W. Bush to the U.S. Court of Appeals for the D.C. Circuit, which is widely regarded as the nation's second most powerful court. A 1986 graduate of Harvard Law School, Estrada served as a law clerk to the Judge Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit and then for Supreme Court Justice Anthony M. Kennedy.<sup>140</sup> Following a year with a New York law firm, he spent two years in the U.S. Attorney's Office for the Southern District of New York, before joining the Justice Department in 1992 as an Assistant to the Solicitor General.<sup>141</sup> He served there until 1997, when he joined the Appellate and Constitutional Law Practice Group of the Washington, D.C. office of Gibson, Dunn & Crutcher, then headed by longtime conservative legal activist and now Solicitor General Theodore B. Olson.<sup>142</sup>

The problem this nomination posed for Democrats is that the Republicans, having blocked President Clinton's efforts to fill the seat Estrada sought, nominated an apparently talented lawyer with a wide reputation for aggressively conservative legal views, but virtually no public record of his jurisprudential thinking. Apparently not wanting either to confirm a young and ardently right-wing judge to the closely divided and immensely powerful D.C. Circuit or to confront the issue of judicial ideology head on, the Democrats instead took the position, while in control of the Senate, that they would not vote on Estrada's nomination in committee unless the Justice Department released memoranda he prepared in the Solicitor General's office.<sup>143</sup> The hope was that these memoranda would reveal his legal orientation.<sup>144</sup> This breached a norm of inter-branch comity; deliberative memoranda within the Solicitor General's office are usually held closely because, as argued by a group of Democratic and Republican Solicitors General, their confidentiality is essential to maintaining full and frank deliberation within an office that is

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<sup>138</sup> Jennifer A. Dlouhy, *Senate Traditions a Casualty in Judicial Nominations Spat*, 61 CONG. Q. WKLY REP. 1735, 1736 (July 12, 2003).

<sup>139</sup> Sen. Patrick Leahy, *Opening Statement, Judicial Nominations Hearing*, at <http://leahy.senate.gov/press/200304/040103.html> (Apr. 1, 2003).

<sup>140</sup> U.S. Department of Justice Office of Legal Policy, *Miguel Estrada: Biography*, at <http://www.usdoj.gov/olp/estrada/bio.htm> (last visited Apr. 22, 2003).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See Lane, *supra* note 130, at A05.

<sup>144</sup> *Id.*

supposed to be conscientiously above partisan politics.<sup>145</sup> Although it is not unprecedented for the executive to share memoranda revealing the content of legal deliberations internal to the executive branch, it is unusual to make their disclosure a precondition for a committee vote.<sup>146</sup>

When the Republicans regained power in 2003, the Judiciary Committee voted to recommend Estrada's confirmation to the Senate.<sup>147</sup> The Democrats took the unusual step of filibustering to block the nomination.<sup>148</sup> At this point, even the staunchly conservative former Republican Majority Leader Trent Lott urged his party to compromise and share the Estrada memos.<sup>149</sup> Instead, the Republicans tried to break the filibuster through an unprecedented series of cloture votes, both of which resulted in a losing 55–45 margin for the Republicans.<sup>150</sup>

Of course, this is not the first era of ideological contentiousness over judicial nominees. Nor, with regard to the Clinton Administration, was it unprecedented during periods of divided government for the party in charge of Congress to review the judicial nominees of the sitting President with extra care. The last decade is nonetheless distinctive because of three factors: (1) efforts by Senate Republicans to hold open unprecedented numbers of lower court seats with the primary objective of undermining the sitting President's power of judicial appointment; (2) the unwillingness of a sitting President to compromise in any serious way with the opposition party in Congress in agreeing to nominate judicial candidates outside the President's political base; and (3) the breakdown of inter-party comity within the Senate. Democrats are retaliating

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<sup>145</sup> See Letter from Seth P. Waxman et al., to the Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary, United States Senate (June 24, 2002), at <http://www.usdoj.gov/olp/solicitorsletter.pdf> (last visited Apr. 18, 2003).

<sup>146</sup> Vermont Senator and former Senate Judiciary Committee Chairman Patrick Leahy issued a statement recounting prior instances when the executive branch shared with the Senate, in a variety of contexts, internal deliberative memoranda indicating the legal views of various members of the executive branch. Sen. Patrick Leahy, Statement On The Cloture Vote On The Nomination Of Miguel Estrada, March 18, 2003, at <http://leahy.senate.gov/press/2003/03/031803.html> (Mar. 18, 2003). Given the limited number of such instances, however, most of which did not involve judicial nominations, it is inferable that the Senate Democrats' demand in the Estrada case is an unusual one. See also Letter of Assistant Attorney General Daniel J. Bryant, U.S. Department of Justice Office of Legislative Affairs, to Senator Patrick Leahy, at <http://www.usdoj.gov/olp/aagbryant.pdf> (Oct. 8, 2002).

<sup>147</sup> Jan Crawford Greenburg, *Bush Judicial Pick Clears Panel for Full Senate Vote, Estrada OK'd 10–9 in Testy Hearing*, CHI. TRIB., Jan. 31, 2003, at 13, available at 2003 WL 11548178.

<sup>148</sup> David Montgomery, *A Man on Hold; While the Senate Debates, Judicial Nominee Miguel Estrada Waits. And Waits*, WASH. POST, Mar. 14, 2003, at C01, available at 2003 WL 15466208.

<sup>149</sup> *Frist Brushes Off Lott Criticism on Moving Estrada Nomination*, CONG. DAILY A.M., Mar. 14, 2003, available at 2003 WL 8362754.

<sup>150</sup> Jennifer A. Dlouhy, *Third Vote Can't Charm Lawmakers*, 61 CONG. Q. WKLY. REP. 697, 697 (Mar. 22, 2003).

against the abuses of Clinton-era Republican control and against Bush's ideological fervor, while Republicans undercut the very norms and practices on which they relied to gain some leverage over judicial appointments during the Clinton Administration.<sup>151</sup>

### III. THE CAMPAIGN AGAINST DELIBERATIVE LEGITIMACY AND ITS CAUSES

One may question whether the events described above are aspects of a common phenomenon; whether that phenomenon, if genuine, is a troubling one; and whether, if troubling, it requires any unconventional political response. Before answering each of these questions affirmatively, it may help to clarify what this phenomenon is *not*.

As it happens, each of these critical episodes has involved a destabilizing and antidemocratic initiative by a branch of the national government while in the control of the current, very conservative generation of

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<sup>151</sup> Although I obviously disagree with Professor Prakash's perspective on who has violated which norms with regard to judicial nominations, Prakash, *supra* note 8, at 549, his discussion makes three fair points. The first is that it is difficult from any selective use of numbers to make an air-tight case that one party or another is more clearly to blame for the growing crisis over judicial nominations. The second is that, because multiple norms may be operating in the same domain, it is possible to mistake the observance of one for the breach of another. For example, were the Senate Republicans of 1997–98 breaching the norm of reasonable deference to presidential judicial nominations, or were they observing an emerging norm of diminished receptivity to a President's judicial nominees during a Congress that culminates in a presidential election year? The third is that, in telling this particular tale, it's hard to know where to begin. Did Republicans start the train rolling with their obstructionism during the Clinton Administration, or did Democrats start it in motion with their handling of Supreme Court nominee Robert Bork and their significant increase in resistance to Reagan's judicial nominees in 1987 and 1988? For that matter, why start there? Did Reagan breach traditional norms for judicial nominations by applying stiffer ideological litmus tests than had been imposed by any prior President? Was the successful Republican filibuster of Abe Fortas' 1968 nomination to the position of Chief Justice the beginning of the fall from grace?

With regard to normative constraints, however, the real issue is not who "pushes the envelope" first. Presumably, both sides do. The question is, are there perceptible limits beyond which each side recognizes that partisan and institutional competition has become counterproductive in terms of governance? In this connection, a recent study of judicial nominations from 1977 to 2002 well captures what went wrong during the years of Republican resistance to President Clinton's judicial nominations:

[T]he Republican's [sic] charge that the Democrats [in 1987–88 and in 1991–92] were responsible for initiating the obstruction and delay phenomenon is supported by the objective evidence. But with the situation reversed with a Democrat in the White House and the Republicans in control of the Senate, the evidence clearly shows that the Republicans ratcheted up obstruction and delay, with all-time records for the district and appeals courts, including the then unprecedented [obstruction and delay] for appeals court nominees by the 106th Congress.

*Obstruction and Delay*, *supra* note 131, at 256–57. It is the "ratcheting up" phenomenon—with regard to Congress's appropriations powers in 1995, its investigative powers during the Clinton Administration, and its resistance to judicial nominations—that is moving the political branches to a new and less salutary equilibrium in terms of the competing values of consensus and political combat.



Republican party leadership. In two respects, which will be described in detail later, this is not a coincidence, but there are also two ways to misinterpret the pattern. First, there is no intention to suggest that there is any necessary link between political conservatism per se and assaults against inter-branch norms. In principle, it is no more or less likely that a political party opposed to the animating impulses of checks and balances will be for or against reproductive rights, affirmative action, tax cuts, environmental regulation, or anything else. And, if the behavior at issue is indeed troublesome, it would not be any less so if the driving party were left-wing, rather than right-wing. Second, it is not true that only Republican Presidents, Republican majorities in Congress, and Republican Justices are “pushers of the envelope” with regard to stepping on the toes of coordinate branches. A certain amount of shoving and pushing is part of the normal way of doing business, and Democrats, like Republicans, have sharp elbows from time to time.<sup>152</sup>

These particular episodes are distinctive, however. They are all consistent with the explicit constitutional outlook of the Republican right wing, which, since the Reagan Administration, has been notably hostile to checks and balances.<sup>153</sup> The Republicans’ chief theoretical alternative to robust checks and balances has been a vigorous form of what might be called “presidentialism”—a view of the Constitution that takes the President as the key policy driver and that would grant him an extraordinary range of discretion both unreviewable by the courts and largely uncheckable by Congress. In practice, however, the Republicans’ hostility toward checks and balances is less about the aggrandizement of the Presidency than contempt for democratic pluralism<sup>154</sup>—a pluralism that, for historical reasons, is conspicuously embodied in the very make-up of the Democratic Party. This helps to explain why, for example, in addition to simply wanting power, Congressional Republicans felt comfortable attacking the presidency as an institution while the sitting President

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<sup>152</sup> It is thus not my point that, over any particular period of years, Republicans have committed more breaches of inter-branch etiquette than Democrats. My point is that Republican breaches fit a particular pattern that seems to transcend the substance of any particular political issue and which, given the current polarization of the parties, portends ill for fulfilling the consensus-building potential of our checks and balances system.

Likewise, it is not my argument that the current Republican Party is hostile to checks and balances (not “separation of powers,” as Professor Prakash says) because of its demographics, but rather that its demographics make the full scope of its hostility to checks and balances politically sustainable. I will not refute Professor Prakash’s arguments that I have failed to substantiate characterizations of the Republican Party, which simply do not appear in my paper, even by implication.

<sup>153</sup> Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 161-65 (1995).

<sup>154</sup> A good example appears in the contrasting portraits Professor Steven Calabresi draws in *Unitary Executive*, *supra* note 28, between a Congress rife with regional bias and special interest pandering and the Executive, who is solely accountable to a national electorate.

was a Democrat, while making extraordinary claims for presidential authority when Republican Presidents have held the White House.<sup>155</sup> What congressional Republicans seem not to have noticed, now that both ends of Pennsylvania Avenue are Republican-controlled, is that the primary institutional victim in the assault on checks and balances is Congress.<sup>156</sup>

It is, however, the judicial branch of the national government that has provided the most striking expression of contemporary contempt for modern democratic norms, namely, in the Supreme Court's decision in *Bush v. Gore*.<sup>157</sup> Thus far, no one has proffered a legally persuasive case for shortcutting the statewide recount ordered by the Florida Supreme Court.<sup>158</sup> Even if that judicial body, which, unlike the United States Supreme Court, is accountable to the electorate, had been unduly creative in its own reasoning—a point I do not concede—the United States Supreme Court did not offer any convincing federal ground for interfering with a statewide recount.<sup>159</sup> Judge Richard Posner, without defending the reasoning of *Bush v. Gore*, has argued that *Bush v. Gore* was defensible as a prudential measure to avoid the political disaster that might have befallen the nation had Congress been left to sort things out.<sup>160</sup> If, however, the Constitution vests in Congress the function of refereeing presidential elections, then divesting Congress of that power would hardly seem to be a legitimate decision for the Supreme Court to make. Moreover, if any “extralegal” factor should have governed the Court's exercise of prudence, it should have been that Vice President Al Gore had decisively won the popular vote. That is, if the unelected Supreme Court were intent on doing the nation an institutional favor, surely the presumption

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<sup>155</sup> Professor Prakash thinks it odd to call Republicans presidentialists when Republican Congresses, faced with a Democratic president, worked so hard to curtail the executive. Prakash, *supra* note 8, at 552. I did not say, however, that the Republican Party as a party was presidentialist, but that its leading theoreticians (including Professor Prakash) are.

<sup>156</sup> Kirk Victor, *Congress in Eclipse*, NAT'L J., Apr. 5, 2003, at 1066, available at 2003 WL 5140907

<sup>157</sup> 531 U.S. 98 (2000).

<sup>158</sup> The literature commenting on *Bush v. Gore* is immense. See, e.g., BUSH v. GORE: THE COURT CASES AND THE COMMENTARY (E.J. Dionne, Jr. & William Kristol eds., 2001); THE NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 184, 199 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Symposium, *The Law of Presidential Elections: Issues in the Wake of Florida 2000*, 29 FLA. ST. U. L. REV. 325 (2001). My own views appear at Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535-585 (2001).

<sup>159</sup> See Shane, *supra* note 158.

<sup>160</sup> Richard A. Posner, *Bush v. Gore: A Reply to Friedman*, 29 FLA. ST. L. REV. 871 (2001).

should have been in favor of deciding the case in a way most likely to enable the American people to be governed by the presidential candidate they had actually preferred. It is among the more remarkable features of *Bush v. Gore* that the word “democracy” does not appear in the opinion. History will not treat it as mere coincidence that the United States found itself with a right-wing Republican President in January 2001 because the five most conservative members of the United States Supreme Court effectively short-circuited the election count in November, 2000.<sup>161</sup>

*Bush v. Gore* corresponds with the other episodes described because it stands as an astonishing departure from institutional norms with regard to inter-branch relations. Never before has the Supreme Court directly implicated itself in the political selection of the authorities in charge of another branch of government. It has invoked the political question doctrine as a ground for staying out of the political arena in cases in which judicial intervention would have seemed far more legitimate than the resolution of a presidential election.<sup>162</sup> Most disturbing of all, a Court that, on such insubstantial ground, would decide a presidential election can hardly be counted on to exercise institutional prudence in any future case that might counsel for deference to the decisions of the elected branches of the national government. Indeed, recent developments in judicial review reveal an increasingly conspicuous pattern of disrespect for the coordinate branches in implementing constitutional values.

The repeated willingness of the Republican Party’s most conservative elements to engage in destabilizing and antidemocratic initiatives, however, is supported by more than the proffered constitutional views of its leading theorists. It also reflects the changing social and ideological character of the party. Political scientists have documented that, since the 1970s, the diversity of each major political party’s base has declined, “reducing internal conflicts and making more unified party voting more likely.”<sup>163</sup> Each political party, especially in the House of Representatives, has moved closer to the voting preferences of its ideological base—so much so that there is little overlap in voting behavior between “moderate Republicans” and “conservative Democrats,” especially in the House.<sup>164</sup>

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<sup>161</sup> The most fervent contemporary expression of this judgment presumably belongs to Bruce Ackerman. Bruce Ackerman, *Anatomy of a Constitutional Coup*, 23 LONDON REV. OF BOOKS 5 (Feb. 8, 2001).

<sup>162</sup> See, e.g., *Nixon v. U.S.*, 506 U.S. 224 (1993) (holding that the constitutional sufficiency of Senate procedures for judicial impeachment trials presents a nonjusticiable political question).

<sup>163</sup> See JEFFREY M. STONECASH ET AL., *DIVERGING PARTIES: SOCIAL CHANGE, REALIGNMENT, AND PARTY POLARIZATION* 20–21 (2003).

<sup>164</sup> See *Vote Ratings*, NAT’L J., Feb. 1, 2003, at 349, available at 2003 WL 5140638 (“In the House, Jim Leach of Iowa and Constance A. Morella of Maryland were the only Republicans whose scores ranked them deeply within the liberal side, while Ralph M. Hall of Texas,

Yet, the phenomenon has not been identical for both parties. The Republican shift to a base of support that is more rural, more affluent, and more disproportionately white has given that party an activist base that is far less likely than the Democratic base to embody substantial divergences of economic, social, and cultural interests. Thus, although the general drift of the Democratic Party has been decidedly liberal, the dynamics of those areas in which the Democratic Party holds dominance—New York or Chicago, for example—pose significantly greater challenges for the party in mediating differences among its core constituents. The party has even tried, while moving leftward, to hold on to its well-organized pro-business constituencies,<sup>165</sup> and has been more successful than the Republican Party at attracting the involvement of minorities or the poor. As a result, norms of deliberation and consensus-building are inescapable elements of Democratic political strategy; the party cannot afford any of its contentious constituencies to regard itself as utterly neglected. Republicans, by contrast, have prospered by insisting on a level of party discipline that simply would be impossible without a far more homogeneous party base.

The Republicans Party's increasingly narrow ideological base and homogeneous constituency reinforce the attractiveness of its conservative thought leaders' opposition to constitutional views that embrace dissent, deliberation, pluralism, and accommodation. The current leadership of the House of Representatives shows little flexibility in dealing even with intra-party dissent, and has abrogated much of the 1994 "Contract With America" designed to curb what Republicans then said were Democratic abuses of majority power.<sup>166</sup> The mutual reinforcement of party demographics and a narrow ideology that is hostile to deliberative democratic legitimacy is what signals that the breaches of inter-branch norms reflect a genuine political tendency, and not just a series of unconnected political misadventures.

This might not matter, especially if conventional avenues of political competition made the matter easy to correct. But they do not. The judiciary, of course, is not elected and possesses lifetime tenure. Even if outrage over *Bush v. Gore* were more widespread, no electoral retaliation against the majority Justices would be possible. Perhaps more important

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Ken Lucas of Kentucky, and David Phelps of Illinois were the only Democrats whose scores ranked them deeply within the conservative wing").

<sup>165</sup> Emblematic of that success is the influence within the Democratic Party of the pro-business Democratic Leadership Council, which provided a strong basis of support for the presidential candidacies of Bill Clinton and Al Gore. Extensive information about the DLC is available at <http://www.ndol.org/index.cfm> (last visited April 20, 2003).

<sup>166</sup> Gebe Martinez, *Democrats Cry Foul as GOP Eases Several House Rules*, 61 CONG. Q. WKLY. REP. 90, 90 (Jan. 11, 2003). See also Jonathan Allen, *Effective House Leadership Makes the Most of Majority*, 61 CONG. Q. WKLY. REP. 746 (Mar. 29, 2003).

is the fact that the anti-majoritarian composition of the Senate and the antidemocratic bias it lends to the electoral college system play greatly into the hands of an ideologically narrow-banded party that is widely dispersed geographically. That is because the nearly half of the U.S. population that resides in Republican-dominated states resides in states that are smaller and thus overrepresented in Congress, especially in the Senate.

The 2000 presidential election proves the point dramatically. Each state currently casts one electoral vote for each of its Senators and one for each member of the House of Representatives.<sup>167</sup> Thus, of the 271 electoral votes credited to George W. Bush, 60 represented the Senate-based electoral votes coming from each of the 30 states he won. Yet, the population of those states accounts for slightly under half of the total U.S. population.<sup>168</sup> A more democratic electoral account—albeit one still over-representing the smallest states—would give each state electors based only on its seats in the House of Representatives, which is based on population. Giving the District of Columbia only one elector, equivalent to the minimum number of House members accorded to every state, the electoral count under this method would have been 225 for Gore to 211 for Bush, rather than 271 for Bush and 266 for Gore. In other words, Gore lost not because we have an electoral college, but because we have an electoral college that is so profoundly malapportioned.<sup>169</sup>

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<sup>167</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>168</sup> Data on the 2000 presidential election results are taken from [http://www.archives.gov/federal\\_register/electoral\\_college/electoral\\_college.html](http://www.archives.gov/federal_register/electoral_college/electoral_college.html) (last visited April 20, 2003). State population figures appear at <http://www.census.gov/population/www/cen2000/phc-t2.html> (last visited April 20, 2003).

<sup>169</sup> Because an electoral college system requires presidential candidates to pay close attention to all, rather than just the most populous states, it could well be argued that the existence of some form of electoral college is actually an important mechanism in support of deliberative democracy. My point is thus not to criticize the existence of an electoral college per se, but rather to show how—by building on the malapportionment of the Senate—it plays especially into the hands of an ideologically narrow, but geographically dispersed party and complicates the argument that, if “the people” are unhappy with one-party control, they can effectively retaliate at the ballot box. It is sometimes argued also that the problem with the electoral college is not the Senate-based seats, but rather the “unit rule,” under which state legislatures decide to award all of a state’s electors, rather than a proportional number to the winner of the state popular vote. However, the primary alternative to the unit rule—awarding 2 electoral votes per state according to the statewide winner, and then another for each congressional district in which a candidate wins—produces distortions of its own. That is, a candidate can do better in a state by winning a large number of districts by a razor-thin margin than winning a small number of districts overwhelmingly. (Thus, George W. Bush would apparently have done better in the electoral college if electoral votes were awarded by congressional district, not by state. Rhodes Cook, *This Just In: Nixon Beats Kennedy*, WASH. POST, Mar. 25, 2001, at B02, available at 2001 WL 17615712.) The optimal way to balance the deliberative values furthered by the electoral college with democratic fairness would be to continue an electoral

The 2002 Senate elections confirm the pattern. The Republicans currently hold 51 seats. However, the population they represent—crediting them with half the population in those states in which the Senators belong to different parties—comprises only 44.4 percent of the United States.<sup>170</sup> In short, the more widespread geographical distribution of the Republicans, despite their narrower ideological appeal, assures them disproportionate influence in both the executive and legislative branches. For this reason alone, it is not surprising that President George H. W. Bush was not fatally handicapped by the Iran-Contra affair; that public displeasure over the 1995 budget battle and impeachment did not cost Republicans control of Congress; and why, even if the public thought that the Senate treated Clinton's judicial nominees unfairly and should be censured on that score, a national majority would by no means be sufficient to insure a transfer of party control.

Assume that the following propositions are correct: (1) that recent breaches of inter-branch norms of accommodation reflect a now systemic tendency; (2) that this tendency is rooted in the demographics and ideology of the Republican Party; and (3) that the displeasure of a majority of Americans would be insufficient to guarantee that Republican control can be displaced. Would the truth of these propositions truly put the legitimacy of American democracy at risk? An observer as thoughtful and astute as University of Pennsylvania law professor Edward Rubin has recently stated that Americans' commitment to democracy is easily overstated, and that our sense of legitimacy is more dependent on such issues as security, prosperity, and social justice.<sup>171</sup> Professor Robert Bennett has put forth a model of "conversational democracy" in which we regard our system as legitimate not because all are equally represented, but because there is essentially universal adult access to a kind of endless, free-floating, multimedia public policy discussion that extends to all members of the polity a sense of sufficient participation in the system to warrant our allegiance.<sup>172</sup>

Operationally, Rubin and Bennett are clearly on to something. Americans are not up in arms over equal representation in the Senate, and conventional wisdom holds that, while the nation is secure and pros-

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college system, but eliminate the Senate-based seats and award House-based electoral votes proportionally within each state according to the overall state popular vote.

<sup>170</sup> A roster of Senators by state appears at [http://www.senate.gov/general/contact\\_information/senators\\_cfm.cfm?OrderBy=state&Sort=AS](http://www.senate.gov/general/contact_information/senators_cfm.cfm?OrderBy=state&Sort=AS) (last visited April 20, 2003). State population figures appear at <http://www.census.gov/population/www/cen2000/phc-t2.html> (last visited April 20, 2003).

<sup>171</sup> Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 732-33 (2001).

<sup>172</sup> Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481 (1997); Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503 (2000).

perous, incumbents are safe. Yet, it hardly seems tenable, if the ideological gulf widens among Democrats and Republicans, that a majority of Americans will long tolerate the systematic exclusion of their interests and policy preferences by entrenched office holders representing only a minority of Americans. Moreover, we are at an odd cultural moment for any political party intent on entrenching itself in a manner that weakens our checks and balances system's capacity to facilitate compromise and consensus. That is, we have embarked upon a foreign policy that puts a new premium on our explicit national dedication to democracy. The values the United States offers most conspicuously in opposition to the world of authoritarian Islamic governments are the values of tolerance and inclusiveness best instantiated by a checks and balances approach to democratic legitimacy. America's democratic system is thus reaching an imbalance, both in the operation of our institutions and in the mismatch between American democratic rhetoric and practice. The question is what will replace it?

#### IV. WHAT NEXT?

The ideology and demographics of the Republican Party have made the 108th Congress an unexpectedly perilous environment for checks and balances. In recent decades, when Democrats were in charge of both Congress and the Executive branch, the divergent constituencies within the Democratic Party helped insure that inter-branch debate remained robust, even as joint partisan control helped promote some degree of inter-branch comity. Now that Republicans control all three branches of the national government for the first time in recent memory, party discipline and aggressive White House control of the party's agenda have considerably undermined Congress's vigilance with respect to its institutional prerogatives. What should be a contest for influence between co-equal branches, each jockeying for power, even as each accommodates significantly the agenda of the other, is instead unfolding chiefly as a battle between Senate Republicans and Senate Democrats over partisan priorities (with occasional contretemps between House and Senate Republicans). Republican eagerness to stifle the Democrats' impact may well lead to the further erosion of customary practices—such as the “blue slip” requirement in the case of judicial appointments<sup>173</sup>—that have previously been protective of whoever was in the minority party. This trend presumably is no cause for concern among Republicans who imagine they will never again be in the minority or among Democrats who, anticipating an eventual return to Democratic control of one or both political branches, would be happy to run a government in which allegiance to

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<sup>173</sup> See Dlouhy, *supra* note 138.

norms of bipartisan and inter-branch accommodation have been significantly eroded. Yet, for others of us to whom the ethos of deliberative democracy is more appealing, the future is worrisome.

Of course, it is by no means certain that episodes like those described above are destined to mark a long-term move away from the *modus vivendi* of the late 20th century and towards a form of inter-branch and inter-party competition that is more brutal and less accommodating. After all, it may seem hard to imagine recurrences of the Iran-Contra, budget showdown, and impeachment scenarios. Republicans presumably will not repeat their mistakes, and Democrats are unlikely to perceive these initiatives as securing much benefit to the Republicans at the Democrats' expense. Moreover, even if some pre-presidential delinquency were to surface in, say, the life of President George W. Bush, the diversity of constituencies within the Democratic Party would likely prove a sufficient safeguard against mounting a purely partisan impeachment on grounds unrelated to the welfare of the constitutional system.

Yet the recent history of inter-party warfare over judicial appointments points in a negative direction. In this area, we are already seeing an escalation of retaliatory moves that shows no obvious prospect of bipartisan resolution. There is more at stake than the appearance of civility. The potential damage to the judiciary, both in delaying the filling of vacancies and in undermining public faith in judicial independence, is considerable.

It is not hard to imagine what a peacekeeping deal would look like. The White House and Senate Republicans could signal an end to the era of mutually-assured obstruction by agreeing with the Democrats to a bipartisan "treaty." The parties could agree, for example, that President Bush would nominate to half the number of appellate judicial vacancies existing on January 20, 2001 judicial candidates who had originally been nominated by President Clinton and delayed. These nominees could even be allocated in a way that would preserve or achieve in at least the short term a Democratic majority on any appellate court that would have had a Democratic majority had Republicans processed Clinton nominees fairly and promptly. In an ideal world, such an inter-branch "treaty" would be followed by a Bush turn to moderation among judicial appointees that would emulate Clinton's. But even if President Bush remained committed to judicial partisans of the right, his approach would be considerably less troublesome as a matter of inter-branch politics if he were not also seeking a windfall in judicial appointments due to the past intransigence of Senate Republicans. Post-treaty, if Democrats began to behave like the late 90's Senate Republicans, Republicans would have both standing to complain and the power to respond effectively. The problem with such a scenario is that the equilibrium of mutual forbear-



ance can only be reasserted at the initiative of the now-dominant Republican right wing. It is hard to identify the incentives that would drive them to such an initiative.

What seems more probable is that something like the current period of trench warfare will continue, with the ongoing temptation for each party not merely to oppose, but to seek to undermine the other in the eyes of the voting public. Each confronts its internal tensions. Republicans will suffer conflicting pressures, on one hand, to accommodate enough of the northeastern moderates' agenda to keep them from leaving the party and, on the other, to purge the moderates from any positions of influence and continue on a path towards an ideologically narrow party that worries little about the institutional prerogatives of Congress or the importance of legitimating democratic rule by taking all contending interests seriously. The conflicting pressures on Democrats will be to move enough towards the Republican agenda to pick up swing voters in key states and disable the Republican strategy of ruling with a national minority of the popular vote, and, contrarily, to move more decisively to the left in order that the party be able to govern with the greater cohesiveness and discipline that the Republicans have managed to achieve.

No matter which strategy prevails, there is reason to worry that new habits of unalloyed combat will have replaced old habits of mutually respectful competition, to the long-term detriment of democratic vitality in the United States. It would not be surprising if the results of many more years of the current pattern included a further alienation of American voters, continued declines in political interest and participation, and persistent erosion in the larger society of those norms of mutual respect and accommodation that nurture social trust and cooperation. None of this is susceptible to ready measurement, and it may be easy, given the imponderables of politics and the natural ebbs and flows of partisan influence, to believe that nothing much is at stake. That is, as long as the United States remains reasonably prosperous and secure, vagaries in the quality of our democratic life are too obscure and uncertain to worry about. On the other hand, it may be that what is hardest to measure about our political life is also the most precious, the easiest to lose, and hardest to recover. The Framers bequeathed us a system in which principles of representative and deliberative democracy might work together to produce a government uniquely suited to the legitimacy demands of a diverse citizenry. We should not squander that legacy.